

File

**BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals**

Application of Dane County Natural Heritage
Foundation, Inc., for a Ditch Plug Permit, Six Mile
Creek Tributary, Town of Vienna, Dane County,
Wisconsin

Case No. 3-SD-95-3067

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Dane County Natural Heritage Foundation, Inc. applied to the Department of Natural Resources (Department) for a permit to construct, operate and maintain a ditch plug on an unnamed tributary of Six Mile Creek. The Department made a preliminary determination that the proposed project is not expected to cause significant adverse environmental effects. The Department issued a Notice of Proposed Ditch Plug which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permit without a hearing. Several timely objections were received.

On April 30, 1997, the Department forwarded the file to the Division of Hearings and Appeals for hearing. Pursuant to due notice a hearing was held in Madison, Wisconsin on June 10, 1997, before Mark J. Kaiscr, Administrative Law Judge.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Dane County Natural Heritage Foundation, Inc., by

Lauren L. Azar, Attorney
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Madison, Wisconsin 53701-1806

Wisconsin Department of Natural Resources, by

Richard Henneger, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

FINDINGS OF FACT

1. Dane County Natural Heritage Foundation, Inc. (DCNHF) is a non-profit corporation whose stated mission is the protection of natural areas in Dane County through conservation easements, land donations and education.

2. In 1994, Hazel Wilke Knudson donated a forty acre parcel in the Town of Vienna to the DCNHF. The legal description of the parcel is the SW 1/4 of the SW 1/4 of Section 32, Township 9 North, Range 9 East, Town of Vienna, Dane County. The parcel is part of a modified wetland which was farmed. The DCNHF has converted the parcel into a wildlife preserve known as the Wilke Preserve.

3. The DCNHF is in the process of carrying out a prairie/wetland restoration project at the Wilke Preserve. The DCNHF has been awarded a stewardship grant from the Wisconsin Department of Natural Resources (Department) to assist with this project.

4. An unnamed tributary of Six Mile Creek runs through the Wilke Preserve. As part of the wetland restoration, the DCNHF filed an application dated June 9, 1995, for a permit pursuant to sec. 31.06, Stats., to construct, operate and maintain a ditch plug (dam) on the bed of the unnamed tributary. The DCNHF filed an amended application on March 8, 1996. The Department and the applicant have complied with all procedural requirements of sec. 31.06, Stats.

5. The proposed dam will consist of an earthen embankment with a water control structure. The water control structure consists of a 24 inch in diameter culvert with a 48 inch tall half circle riser at the inlet side of the dam. The riser will contain removable stop logs to control the height of the water behind the dam. The dam will create a shallow impoundment behind it.

6. The unnamed tributary is navigable at the location of the proposed dam.

7. At the hearing, neighboring property owners raised concerns that the proposed project will impact drainage and groundwater levels on their property. The neighbors fear that the result will be that portions of their farms will become wetter and unfarmable. Professor Leonard Massie, an expert in engineering phases of soil and water management, testified that the impact on surface water of the proposed project will be confined solely to the Wilke Preserve property. Professor Massie further testified that the proposed project will have a minimal or no impact on groundwater.

The concerns voiced by the neighboring property owners were based on personal observations of water and soil conditions on their respective farms. Although these personal observations should not be discounted, the persons testifying admitted they had no scientific evidence or data to support their belief that the proposed project will result in wetter soil conditions on their farms. An extensive network of drain tiles has been

constructed to drain the land in this area. Professor Massie recommended as a permit condition for the proposed project that existing drain tiles which drain towards the Wilke Preserve be opened above the elevation of the impoundment. This condition should ensure that drainage on neighboring properties will not be affected.

Based on the evidence in the record, it appears the proposed project will have no impact on surface water on any neighboring property and, at most, a minimal impact on groundwater levels. As an additional safeguard, it should be noted that the proposed project was modified to include a water control device. If, under any circumstances, the dam does cause water to back up onto neighboring property, stop logs can be removed from the water control device allowing more water to flow through the dam.

8. The proposed project, if constructed in accordance with this permit, will not adversely affect water quality in the unnamed tributary, will not increase water pollution in surface waters and will not cause environmental pollution as defined at sec. 299.01(4), Wis. Stats. The purpose of the proposed project is to restore wetlands. The restored wetlands should positively impact water quality by controlling sedimentation and processing nutrients before water enters Six Mile Creek. Six Mile Creek, in turn, drains into Lake Mendota.

9. The applicant has furnished proof satisfactory to the Department that the applicant owns the dam site and all the land which will be flowed by the impoundment.

10. The proposed dam will not be capable of developing hydraulic power.

11. The nearest municipality to the proposed dam is the Village of Waunakee. No dams exist upstream or downstream from the site of the proposed dam.

12. The construction, operation, and maintenance of the proposed dam is in the public interest considering ecological, aesthetic, economic, and recreational values, provided the conditions in the permit are complied with.

13. The Department has complied with the requirements in sec. 1.11, Wis. Stats., and Ch. NR 150, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority pursuant to secs. 31.06 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue the permit requested subject to the conditions specified.

2. Pursuant to sec. NR 150.03(8)(f)7.d, Wis. Adm. Code, the proposed project is a type III action. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND HEREBY THERE DOES ISSUE AND IS GRANTED to the applicant, Dane County Natural Heritage Foundation, Inc., a permit under sec. 31.06, Stats., to construct, operate and maintain a dam across an unnamed tributary of Six Mile Creek in the SW 1/4 of the SW 1/4 of Section 32, Township 9 North, Range 9 East, Town of Vienna, Dane County, subject to the following conditions:

1. The permittee must not construct the dam and impoundment until plans for the structure and impoundment basin have been submitted to and approved by the Department. The permittee must submit plans for clearing of the lands to be flowed in accordance with sec. 31.18(4), Stats.
2. The permittee must notify Water Management Specialist Ron Grasshoff, Madison, Wisconsin (phone 608-275-3228) not less than five days before starting construction of the dam and flowage, and again not more than five days after the project is complete.
3. The project must be completed according to the plans and specification submitted by the applicant. This permit does not authorize any work other than what is described in the plans, or as modified by the conditions of this permit. If the permittee wishes to alter the project or permit conditions, the permittee must first obtain written approval of the Department.
4. This permit must be recorded with the Register of Deeds, Dane County, in connection with the land described herein, within thirty days after completion of the project. The permittee must notify the Department of the volume and page it is registered on within 45 days after completion of the project.
5. Pursuant to sec. 31.11, Stats., this permit shall become null and void unless the dam authorized is completed within five years from the date of issuance of this permit. Except that prior to the expiration of the permit, the permittee may request an extension of up to two years which may be granted, for good cause, by the Department.
6. The permittee must restrict the removal of vegetative cover and exposure of bare ground to the minimum amount necessary for construction. The permittee must protect areas of exposed soil from erosion by seeding and mulching, riprap, sodding, diversion of surface runoff, installation of straw bales or silt screens, construction of settling basins, or similar methods as soon as possible after removal of the original ground and before construction is completed.
7. Flow from the tile outlet, located near the downstream toe of the embankment, must not be interrupted during and after construction of the dam structure. Prior to the completion of the dam, any and all existing drain tiles which drain towards the Wilke preserve shall be opened above the elevation of the impoundment.

8. The applicant shall identify a person who will be responsible for removing stop logs from the water control device in the event the dam causes water to back up onto neighboring properties. The applicant shall provide the name of the responsible person and a means to contact this person to the neighboring property owners.

9. The permittee may not transfer ownership of the dam without proper authority under sec. 31.185, Stats.

10. Development connected with this project shall conform to local zoning ordinances and the standards for flood plain and shoreland development contained in Chapters NR 115 and NR 116, Wis. Admin. Code.

11. The permittee must allow free and unlimited access to the project site at any time to any Department employee who is investigating the project's construction, operation or maintenance.

12. The permittee must keep a copy of this permit and approved plans at the project site at all times during construction of the dam and impoundment. A copy of this permit shall constitute the certificate evidencing a grant of the permit as provided in sec. 31.11, Stats.

13. The Department may modify or revoke this permit if the project is not completed according to the terms of the permit, or if the Department determines the project is detrimental to the public interest.

14. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described herein.

Dated at Madison, Wisconsin on July 11, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: Mark J. Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.